

ARKANSAS SUPREME COURT

No. CR 06-849

NOT DESIGNATED FOR PUBLICATION

BRIAN CROSSNO

Petitioner

v.

STATE OF ARKANSAS

Respondent

Opinion Delivered

September 14, 2006

MOTION FOR RULE ON CLERK [CIRCUIT
COURT OF JOHNSON COUNTY, CR 2001-79,
HON. DENNIS SUTTERFIELD, JUDGE]

REMANDED

PER CURIAM

In 2002, Brian Crossno entered a plea of guilty to delivery and manufacture of a controlled substance and was sentenced to ninety-six months' imprisonment. Imposition was suspended on an additional forty-eight months' imprisonment. On September 23, 2005, an amended judgment was entered.

On November 16, 2005, attorney Herschel W. Cleveland filed a motion seeking to set aside the amended judgment on the grounds that Crossno was not notified prior to the amendment's being entered, that the time for appeal had run, that no reason for the amendment was stated, and that the amended judgment had the effect of requiring the defendant to serve additional time. On January 20, 2006, the court entered an order denying the motion to set aside the amended judgment. The court also entered a "*nunc pro tunc*" judgment and commitment order that was essentially the same as the previous amended judgment with the exception that "*nunc pro tunc*" appears in place of "amended" under the title. The order indicated that the motion was heard on December 21, 2005, with Mr. Cleveland appearing for Mr. Crossno.

On February 27, 2006, Crossno filed a *pro se* notice of appeal indicating his desire to appeal the order heard on December 21, 2005. He also filed a petition for alternative public service work in lieu of the fines and costs, two requests for leave to proceed in forma pauperis, and a motion for

reconsideration as to the order denying the motion to set aside the amended judgment. On April 21, 2006, the court denied the *pro se* motion for reconsideration and petition for alternative public service work. The order indicated that the motion and petition were heard on April 5, 2006, and that the defendant appeared without counsel.

On April 26, 2006, the court entered an order appointing the Arkansas Public Defender Commission to represent Crossno. The order reflected that the representation was for an appeal of an order arising from the April 5, 2006, hearing denying a petition for reconsideration. Attorney James Dunham, Managing Public Defender for the judicial district in which the case originated, subsequently filed a motion on May 22, 2006, to set aside the order appointing the public defender to represent Crossno. On July 12, 2006, the court denied the motion.

On July 18, 2006, a certified record of the proceedings in circuit court was tendered to this court. Our clerk declined to lodge it because the only notice of appeal in the record was the *pro se* notice filed by Crossno, which was not timely filed. The clerk notified James Dunham that the record had been received, and Mr. Dunham filed the motion for rule on clerk that is now before us. In the motion, Dunham seeks to lodge the record, to have himself and the Arkansas Public Defender Commission relieved of responsibility to represent Crossno, and to have trial counsel held responsible for representing Crossno. It may be assumed that Mr. Dunham is referring to attorney Cleveland inasmuch as he represented Crossno in the proceeding from which the motion for reconsideration arose, and Crossno pleaded guilty in 2002 with no apparent reservation of a right to appeal the original judgment of conviction entered at that time.

Initially, we note that the motion for rule on clerk must be treated as a motion for belated appeal because the notice of appeal was untimely. *See Johnson v. State*, 342 Ark. 709, 30 S.W.3d 715 (2000) (*per curiam*); *see also Muhammed v. State*, 330 Ark. 759, 957 S.W.2d 692 (1997) (*per curiam*). The threshold issue in deciding whether Crossno should be permitted to proceed with an appeal in this court is whether attorney Herschel W. Cleveland, who was attorney-of-record for Crossno, was obligated to perfect an appeal from the January 20, 2006, order that denied the motion

to set aside the amended judgment. Once this determination is made, this court will be in a position to decide if Mr. Dunham was obligated to perfect an appeal of the subsequent order entered April 21, 2006, that disposed of Crossno's *pro se* motions for reconsideration and other relief.

This determination of Mr. Cleveland's obligation is of importance because Rule 16 of the Rules of Appellate Procedure—Criminal provides in pertinent part that trial counsel, whether retained or court appointed, *shall* continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. We have held, however, that a defendant may waive his right to appeal by his failure to inform counsel of his desire to appeal within the thirty-day period to file a timely notice of appeal. *Sanders v. State*, 330 Ark. 851, 956 S.W.2d 868 (1997) (*per curiam*); *Jones v. State*, 294 Ark. 659, 748 S.W.2d 117 (1988) (*per curiam*). Rule 16 has been applied to other instances where the circuit court ruling at issue was an order rather than an original judgment of conviction. *See id.*; *Miller v. State*, 299 Ark. 548, 775 S.W.2d 79 (1989) (*per curiam*).

As this court has no information on whether Crossno made a timely request to Cleveland that he appeal from the January 20, 2006, order and the record does not contain an order relieving Cleveland, the proper disposition of the motion in this case requires findings of fact which must be made in the trial court. Accordingly, we remand the matter to the circuit court for an evidentiary hearing on the issue of whether Mr. Cleveland was informed by Mr. Crossno within the time period allowed for filing a notice of appeal that he desired to appeal from the January 20, 2006, order. The trial court is directed to enter Findings of Fact and Conclusions of Law within the ninety days and submit the findings and conclusions to this court with the transcript of the evidentiary hearing. Those aspects of the motion before us pertaining to Mr. Dunham's responsibility with respect to representing Crossno on the April 21, 2006, orders will be addressed after the remand is returned.

Remanded.